In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-575

SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-597

INTERSTATE COMMERCE COMMISSION,

Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-604

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

REPLY TO MEMORANDUM FOR THE UNITED STATES

HAROLD E. SPENCER
THOMAS F. McFARLAND, JR.
RICHARD S. M. EMRICH III
20 North Wacker Drive
Chicago, Illinois 60606
Attorneys for Respondents
Board of Trade of the City of Chicago
FS Services, Inc.
Illinois Farm Bureau
Illinois Grain Corporation
St. Louis Grain Corporation

BELNAP, McCARTHY, SPENCER,
SWEENEY & HARKAWAY
Of Counsel

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The United States has suggested that the Court should grant the requested petitions for writ of certiorari, and has asserted as the principal ground therefor that a conflict exists between the judgment of the court below (570 F.2d

1349) and that in *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F.2d 994 (D.C. Cir. 1977). It states that the issue here is whether the court of appeals had jurisdiction to review a decision of the ICC refusing to investigate a proposed rate increase. It omits in this statement of issue the central fact that gave the court below jurisdiction, which was not present in *Asphalt Roofing*: that the proposed tariffs were unlawful on their face, thus permitting review "to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority." *Trans Alaska Pipeline Rate Cases,* ..... U.S. ....., 56 L.Ed.2d 591 (1978), footnote 17 at 56 L.Ed.2d 598.

The ICC is "authorized and required to execute and enforce the provisions of" the Interstate Commerce Act, 49 U.S.C. §§ 1-29, including those provisions (§§ 2, 3(1), 4(1), and the Elkins Act) which were patently violated by the proposed tariffs.[1] The ICC has no power or discretion to permit a patently unlawful tariff to take effect.

However discretionary the underlying statutory grant of power, the power must be exercised lawfully, and no blatantly unlawful action by any administrative agency is beyond the power of the courts to review and set aside. *Atchison, T.&S.F. R.* v. *Bd. of Trade,* 412 U.S. 800 (1973) at 822, n. 16; *Oestereich* v. *Selective Service Bd.,* 393 U.S. 233 (1968); *Fein* v. *Selective Service System,* 405 U.S. 365 (1972).

The United States does not deny that the tariffs were apparently unlawful. In their *Memorandum,* page 5, n. 6, they admit the apparent unlawfulness and actually, though inconsistently, concede the distinction between the instant case and the *Asphalt Roofing* decision.

> The *Asphalt Roofing* case is technically distinguishable from the present decision on the ground that it involved a general revenue increase and implicated questions of the Commission's judgment, whereas the present case involves a more narrow rate proposal and rates that arguably are unlawful on their face. This distinction will not stand up, however, because the threshold question in both cases is the court of appeals' jurisdiction to examine the Commission's decision. The argument that the Commission abused its discretion in not opening an investigation is stronger where, as here, the probable unlawfulness of the rates is apparent without detailed study, but the extent of jurisdiction should not turn on the strength of the position of the aggrieved parties. See *United States* v. *MacDonald,* 435 U.S. 850, 857-858 n.6 (1978).

[1] 49 U.S.C. § 12.

The jurisdiction of the court below was rooted in the unlawful action of the ICC in refusing to investigate patently unlawful tariffs. The court below acted properly and in a manner not inconsistent with any decision cited by the United States or known to respondents.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

HAROLD E. SPENCER
THOMAS F. MCFARLAND, JR.
RICHARD S. M. EMRICH III
20 North Wacker Drive
Chicago, Illinois 60606
Attorneys for Respondents
Board of Trade of the City of Chicago
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